

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 12-2005:

PROFESSIONAL INTERDISCIPLINARY) Case No. 1848-2005
FEDERATION LOCAL 3399, MEA-MFT,)
NEA, AFT, AFL-CIO,)

Petitioner,

vs.

MONTANA DEPARTMENT OF PUBLIC)
HEALTH AND HUMAN SERVICES,)
MONTANA DEVELOPMENTAL CENTER,)

Respondent.)

) **FINDINGS OF FACT,**
) **CONCLUSIONS OF LAW AND**
) **RECOMMENDED ORDER**
)

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I. INTRODUCTION

On March 10, 2005, the Professional Interdisciplinary Federation Local 3399, MEA-MFT, NEA, AFT, AFL-CIO, filed a petition for unit clarification, alleging that the position of Occupational Safety and Health Specialist should be included in its existing bargaining unit with the employer Montana Department of Public Health and Human Services (DPHHS), pursuant to Mont. Code Ann. § 39-31-202. The Board of Personnel Appeals (BOPA) served a copy of the petition upon DPHHS. DPHHS denied that the position should be included in the bargaining unit, alleging that the position involved managerial functions barring its inclusion in the unit and lacked a sufficient community of interest with the existing unit members to support inclusion. On May 24, 2005, BOPA, acting through its agent, found that the dispute involved a question of fact and transferred the case to the Hearings Bureau.

Hearing Officer Terry Spear set a schedule for the contested case proceeding. Richard Larson, Harlen, Chronister, Parish & Larson, P.C., represented the federation. Arlyn L. Plowman, Labor Relations Specialist, Montana Department of Administration, participated as the advocate for DPHHS. The contested case hearing convened and concluded on September 19, 2005, at DPHHS's facilities in Boulder, Montana. Donald Alsager, Rusin Van Dyke, and Joe Douglas testified under oath. The Hearing Officer admitted Exhibit P1 (the Collective Bargaining Agreement), Exhibit A1 through A7 (the position description, unsigned, to which Van Dyke was referred and from which he testified), Exhibit B (Employee Injury Report, 2005, a blank form) and Exhibit C1 through C2 (Safety Committee Minutes, 4/21/05).¹ DPHHS filed

¹ Exhibit P-1 is so labeled. Exhibits A, B and C are labeled with small letters ("a" etc.), but appear in the transcript as capital letters.

the final brief after hearing on November 12, 2005, and the Hearing Officer deemed the case submitted for a proposed decision.

II. ISSUE

The issue is whether the existing bargaining unit established for collective bargaining purposes, pursuant to Mont. Code Ann. § 39-31-202, appropriately includes the position of Occupational Safety and Health Specialist.

III. FINDINGS OF FACT

1. The Montana Developmental Center (the Center), is part of DPHHS, within the Disability Services Division, and is located in Boulder, Montana. The Center provides habilitation services to approximately 80 court committed developmentally disabled residential clients.

2. The petitioner, Professional Interdisciplinary Federation Local 3399, MEA-MFT, NEA, AFT, AFL-CIO is the certified exclusive representative for a BOPA-approved bargaining unit of professional employees including dietetic technicians, training and program specialists, occupational therapists, habilitation therapists and social workers, all of whom provide to the Center's clients training, therapy and other professional services that include occupational and physical therapy, vocational training, self help skills training, sex offender treatment, social skills development, recreation, nursing services, and access to medical care. The current collective bargaining agreement (CBA) describes the unit as containing:

[A]ll non-supervisory employees within the following positions at the Montana Development Center: Occupational Therapist; Treatment and Programming Specialist; Social Worker; Recreation Therapist; and Dietetic Technician.

Exhibit P-1. There are approximately 15 employees within the unit.

3. The bargaining unit employees, other than the dietetic technician, are in the Client Services Bureau and are supervised by two Client Services Directors. The dietetic technician is in the Nutritional Services Bureau. Both the Client Services Bureau and the Nutritional Services Bureau provide treatment oriented professional and therapeutic services to the Center's clients.

4. In approximately 1998, long after BOPA approved the bargaining unit and certified the federation as the representative, DPHHS created and filled the Occupational Safety and Health Specialist ("OSHS") position, code number 168102, position number 51871. The position was not in the bargaining unit. When the federation and DPHHS last entered into a CBA (effective July 1, 2003), the position was not added to the unit.

5. The Deputy Superintendent supervised the OSHS until January 2005, when DPHHS hired a full-time Superintendent for the Center.² At that time, the Center's Deputy

² Before January 2005, the Disability Services Division Director served as the Center's Superintendent, spending a few days each month at the Center.

Superintendent, Joe Douglas, became Special Projects Director, and in that new position continued to supervise the OSHS.

6. Both the OSHS and the Staff Development and Quality Assurance Director (also supervised by Joe Douglas) are positions oriented toward programming and facility administration.

7. DPHHS hired the incumbent OSHS, Rusin Van Dyke, in 2002.

8. Bargaining unit members have varied responsibilities and work together to develop and implement programs for the clients. A treatment and programming specialist, for example, might consult with an occupational therapist or with a communication specialist, or might also consult with the OSHS, regarding program development and implementation. The OSHS, like the treatment and programming specialists, is sometimes involved in training and teaching clients and co-workers.³

9. The OSHS is at the same pay grade (13) as the treatment and programming specialists.

10. The OSHS investigates and reports to Center administration regarding incidents that might implicate facility safety or health concerns. In these duties, the OSHS is frequently evaluating and reporting to management upon the conduct of members of the bargaining unit. The OSHS does not discipline, or recommend discipline for, other employees and does not direct other employees in their work.

11. The OSHS does not independently formulate the DPHHS policies for the Center. He can submit proposals, which may be adopted, modified or rejected. Members of management as well as members of the bargaining unit also can submit policy proposals, which likewise may be adopted, modified or rejected.

12. Using his training and expertise, the OSHS has responsibilities regarding the Center's safety policies and programs including:

- analyzing safety and health data to identify trends and to develop strategies;
- organizing statistical information to promote the facility's safety program;
- developing safety policies and procedures;
- monitoring employee compliance with safety policies and procedures;
- performing in-depth safety inspections;
- investigating employee and client accidents and
- administrating the Hazardous Communications Program.

13. The OSHS is responsible for the facility's safety training program including but not limited to research and design of training curricula and materials, as well as development and provision of education for employees, including (as appropriate) clients with jobs at the Center.

³ Vocational training for clients may include employment at the Center, so that clients can also function as employees.

14. DPHHS has adopted the Mandt⁴ philosophy and incorporates it in all aspects of client care and treatment. The OSHS position requires certification as a Mandt instructor and skills and expertise in investigation of accidents/incidents and in assessment of the propriety of Mandt events. The OSHS monitors compliance with the Center's Mandt policies and procedures. Whenever DPHHS employees at the Center use Mandt physical techniques, the OSHS conducts an investigation. The OSHS makes no disciplinary recommendations regarding incidents he investigates, serving solely as investigative fact finder.

15. The OSHS does not investigate allegations of client abuse/neglect; DPHHS retains special investigators for such circumstances.

16. The OSHS participates in the daily incident management meeting. At this meeting, managers review client related events that may present potential adverse client consequences, and then develop strategies and tactics to correct conditions and procedures to prevent similar future incidents. The OSHS participates in the meeting, and can make suggestions, but has no decision-making power or vote in the adoption of any practice or procedure.

17. The OSHS works independently, with little supervision. Accordingly, he has effectively designed his job to suit his interests. He neither formulates nor implements DPHHS's decisions regarding the operation of the Center.

18. The OSHS shares a community of interest with the positions included in CBA's recognition clause. The OSHS performs professional level duties, as do the members of the bargaining unit. The bargaining unit is "interdisciplinary" rather than confined to a particular or even a narrow range of activities. A Treatment and Programming Specialist does not perform the same duties as the Dietetic Technician, for example. There are two supervisors for all of the bargaining unit positions except the Dietetic Technician, so the current unit members have 3 different supervisors altogether. The OSHS has yet a different supervisor, which means the OSHS, like the Dietetic Technician, has a different supervisor than any of the other current members of the bargaining unit. The various bargaining unit positions work collaboratively to ensure that Center residents receive suitable services. The current unit positions also work collaboratively with the OSHS, often regarding services received by Center residents. The OSHS is at the same pay grade (13) as Treatment and Programming Specialists. Finally, Van Dyke, the current OSHS, wants union representation.

IV. DISCUSSION⁵

⁴ The Hearing Officer takes administrative notice (to the extent this description goes beyond the limited evidence on this point) that the "Mandt System" is a program intended to teach a person who deals with patients or clients how effectively to manage a potentially negative or even dangerous situation by first addressing the person's own emotional responses and behavior, then to interact positively with the patient or the client. The program involves a hierarchy of gradual and graded alternatives for de-escalating situations and managing people through interpersonal skills. It includes use, when necessary, of methods for physical restraint of the patient or client.

⁵ The Hearing Officer hereby incorporates statements of fact in this opinion, by reference, to supplement the findings of fact set forth in Section III of this decision. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Mont. Code Ann. § 39-31-202(1), governing collective bargaining for public employees provides:

In order to ensure employees the fullest freedom in exercising the rights guaranteed by this chapter, the [Board] shall decide the unit appropriate for collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees.

The Board of Personnel Appeals (BOPA) has an implementing rule regarding the composition of a bargaining unit, Admin. R. Mont. 24.26.610:

A unit may consist of all of the employees of the employer or any department, division, bureau, section, or combination thereof if found to be appropriate by the board.

Public employees have the right to bargain collectively, however, supervisory and management employees are not “public employees” and therefore do not share this right. *M.P.E.A. v. D. of A.* (1985), 217 Mont. 230, 703 P.2d 862, 864, **citing** Mont. Code Ann. § 39-31-201 **and** *City of Billings v. Billings Fire. Loc. No. 521* (1982), 200 Mont. 421, 651 P.2d 627, 629. “Public employee” is construed broadly. *Local 2390 v. Billings* (1976), 171 Mont. 20, 555 P.2d 507. Any exceptions from bargaining units are construed narrowly. *NLRB v. Hendricks Cty R.El. Memb. Corp.* (1981), 454 U.S. 170, 180-81, **citing with approval** *Ford Motor Company* (1946), 66 NLRB 1317, 1322.⁶

Mont. Code Ann. § 39-31-103(11), as amended effective April 25, 2005, defines “supervisory employee:”

(a) “Supervisory employee” means an individual having the authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.

⁶ Because of the similarity between the National Labor Relations Act (NLRA) and Montana’s public employees’ collective bargaining law, federal administrative and judicial construction of the NLRA is instructive and often persuasive regarding the meaning of Montana’s labor relations law. *Great Falls v. Young* (1984), 211 Mont. 13, 686 P.2d 185 (*Young III*); *State ex rel. BOPA v. Dist. Ct.* (1979), 183 Mont. 223, 598 P.2d 1117. The Montana Supreme Court and BOPA, absent Montana precedent or statutes providing otherwise, look to federal NLRA interpretations to illuminate the meaning of the Montana Public Employees Collective Bargaining Act. *Small v. McRae* (1982), 200 Mont. 497, 651 P.2d 982; **followed in** *Brinkman v. State* (1986), 224 Mont. 238, 729 P.2d 1301.

(b) The authority described in subsection (11)(a) is the only criteria that may be used to determine if an employee is a supervisory employee. The use of any other criteria, including any secondary test developed or applied by the National Labor Relations Board or the Montana Board of Personnel Appeals, may not be used to determine if an employee is a supervisory employee under this section. [Emphasis added.]

This controversy arose under Montana collective bargaining law as it existed prior to the 2005 amendment to the definition of “supervisory employee,” but the controlling law is the law in effect when BOPA decides whether the employee at issue is properly included in the unit established for collective bargaining purposes. *Wallace v. Montana Department Fish, Wildlife & Parks* (1995), 269 Mont. 364, 889 P.2d 817. Therefore, the amended definition of “supervisory employee” applies to this proceeding.

Van Dyke does not have the authority, even on an irregular basis, to act in the interest of DPHHS “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees.” The evidence establishes that he cannot and does not “effectively recommend the above actions.” The very most that could be said is that the OSHS position has the job of training and sometimes evaluating the conduct of co-employees, but without any power to supervise them under the provisions of the statute. Therefore, without reference to secondary tests applicable prior to the effective date of the 2005 amendment, the OSHS position is not that of a supervisory employee.

Mont. Code Ann. § 39-31-103(7) defines “management official:”

“Management official” means a representative of management having authority to act for the agency on any matters relating to the implementation of agency policy.

Unlike the “supervisory employee” test, BOPA can, and really must, refer to National Labor Relations Act (NLRA) precedent to illuminate Montana collective bargaining law regarding the appropriate “management official” test. Montana’s administrative rules contain no expansion of the statutory definition. The Montana Supreme Court has referred to the statutory definition, but without discussion or explanation of the test it involves. *See, City of Billings v. Billings Firefighters* (1982), 200 Mont. 421, 651 P.2d 627, **rev’d on other grounds**, *State Fund v. Lee Rost Logging* (1992), 252 Mont. 97, 827 P.2d 85.

Applying NLRA precedent to this case, employees who fit the “management” exemption to the right collectively to bargain both formulate and effectuate management policies by expressing and implementing employers’ decisions. In *Palace Laundry Dry Cleaning Corp.* (1947), 75 NLRB 320, 323, the meaning of “managerial” employees was articulated clearly:

We are not persuaded that any of the store managers herein concerned are “managerial” employees in the sense that their interests are identified with management rather than with employees, as such, or that their inclusion in the bargaining unit is inconsistent with the purposes of its establishment.

This holding is expanded in the accompanying footnote:

The determination of “managerial” . . . is to some extent necessarily a matter of the degree of authority exercised. We have in the past, and before the passage of the recent amendments to the Act, recognized and defined as “managerial” employees, executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and have excluded such managerial employees from bargaining units. [Citations omitted.] We believe that the Act, as amended, contemplates the continuance of this practice.

Op. cit. at footnote 4.

More than 30 years later, the U.S. Supreme Court quoted *Palace Laundry* with approval in *NLRB v. Yeshiva University* (1980), 444 US 672, 682-83 (emphasis added):

Managerial employees are . . . those who “ ‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.’ ” *NLRB v. Bell Aerospace Co.* [(1974), 416 U.S. 267,] 288 (*quoting Palace Laundry* . . .). These employees are “much higher in the managerial structure” than those explicitly mentioned by Congress, which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.” 416 U.S. *at* 283. Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. *See id. at* 286-287 (citing cases). Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

The current OSHS, Van Dyke, “runs” the fire drill program and the safety culture committee, without authority to tell any employee what to do. DPHHS expects him to develop and recommend policies related to safety and health issues, although he has no authority to adopt or to implement any such policies. He is responsible for monitoring both observance of agency safety policies and compliance with applicable safety and health regulations; he investigates accidents and Mandt incidents; in all these capacities he, again, has no authority to take any action except to report his fact findings and his policy suggestions to management. His proposals for policies, as well as for other DPHHS actions at the Center, are subject to the same management review as proposals submitted by any other employees.

Although DPHHS may have intended the OSHS position to be part of management, it is clear that the position does not include the authority to act for the agency regarding the implementation of agency policy. It is unclear whether the job description in evidence actually matches the job description provided to Van Dyke (some considerable time after he was hired), but Van Dyke’s current job performance does not involve acting for DPHHS regarding implementation of agency policy.

DPHHS ably argued that “management official” is broad enough to include any employee whose job duties require loyalty to DPHHS rather than to the other workers. However, the case law does not support the conclusion that the duty to carry out investigatory functions and report to management on the work conduct of other bargaining unit members,

without the power to take or to recommend discretionary actions that effectively control or implement employer policy, renders the employee a management official.

Van Dyke has not acted as a management official in performing the actual duties of the OSHS position for more than 3 years (to the apparent satisfaction of DPHHS). Therefore, he is a public employee.

The OSHS position was created after the bargaining unit was determined and its exclusive representative recognized and is not included in the unit under the CBA. The federation has the burden of proving that this position should be included in the bargaining unit. *MPEA v. City of Great Falls* (2003), UC No. 17-2002. As the findings reflect, the federation met its burden. Although there are differences in “orientation” of the duties performed by the OSHS (orientated toward programming and facility administration) and those performed by the bargaining unit members (treatment oriented professional and therapeutic services), the differences are not so great as to rebut the evidence of community of interest between the OSHS and the members of the bargaining unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this case and controversy.

2. The position of Occupational Safety and Health Specialist in the Montana Developmental Center, Disability Services Division, Montana Department of Public Health and Human Services, currently held by Rusin Van Dyke, is that of a public employee. The position has a community of interest with the positions included in a collective bargaining unit containing all non-supervisory positions at the Montana Development Center, with the Professional Interdisciplinary Federation Local 3399, MEA-MFT, NEA, AFT, AFL-CIO, as the certified exclusive representative, and is therefore properly included in the unit.

VI. RECOMMENDED ORDER

The position of Occupational Safety and Health Specialist, position number 51871, Montana Developmental Center, Disability Services Division, Montana Department of Public Health and Human Services, is included in the Professional Interdisciplinary Federation Local 3399 collective bargaining unit for non-supervisory positions at the Center.

DATED this 17th day of February, 2006.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
Terry Spear, Hearing Officer
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than March 13, 2006, which is the first business day following the 20 days provided for in Admin. R. Mont. 24.26.215 and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail, the actual last day for filing being Sunday, March 12, 2006.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518